Yap Khay Cheong Sdn Bhd v Susan George a/p TM George

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-1605–09 OF 2015
ROHANA YUSUF, IDRUS HARUN AND MARY LIM JJCA
13 NOVEMBER 2017

Contract — Agreement — Sale and purchase agreement vitiated — Whether agreement executed without free consent and by undue influence — Whether agreement voidable — Whether there was valid contract — Whether appellant could claim specific performance of agreement — Whether monies paid for benefit of respondent — Whether appellant could claim for return of monies paid pursuant to voidable contract — Contracts Act 1950 ss 19(1) & 20

The respondent and the appellant had entered into a sale and purchase agreement ('the first SPA') of a property owned by the respondent at an agreed price of RM550,000. Pursuant to the first SPA, the appellant had paid an earnest deposit of RM38,000, out of which RM33,896.47 was paid to OCBC Bank to regularise the respondent's mortgage account and the balance earnest deposit in the sum of RM4,103.53 was paid in cash. The balance of purchase price of RM247,000 was paid into the respondent's Maybank account. Problem arose when OCBC found that one Tharvinder had impersonated the respondent and executed the first SPA. The parties then agreed to rescind the first SPA and to enter into the second SPA on similar terms as the first SPA. On 22 August 2012, the respondent informed the appellant that she did not want to proceed to complete the second SPA. The respondent claimed that she was threatened, forced and fraudulently misled by the appellant and also by Tharvinder into signing the second SPA. Consequently, the appellant filed an action in the High Court claiming for specific performance of the second SPA and alternatively, the appellant claimed for the return of the monies paid pursuant to the first SPA and deemed made under the second SPA. The High Court dismissed both the claim and the alternative claim by the appellant. The learned judge found that the second SPA was not signed voluntarily by the respondent. The learned judge also concluded that the right party to refund would be Thavinder, hence, the proper claim of the appellant had to be directed to Thavinder. Aggrieved by the decision, the appellant filed the present appeal.

Held, allowing the appeal in part:

(1) The learned judge found that the second SPA was not signed voluntarily by the respondent. The court agreed with the finding of the learned judge as it was a finding of fact based on the oral testimonies of witnesses before

him. Since the learned trial judge found that the second SPA had been executed without free consent and by undue influence, the second SPA was therefore voidable at the option of the respondent, as provided under s 19(1) of the Contracts Act 1950 ('the Act'). The respondent had correctly exercised her right to vitiate the second SPA, hence, there was no valid contract to enforce any specific relief sought by the appellant (see paras 14 & 16).

(2) It was clear that the monies paid by the appellant was for the benefit of the respondent as envisaged by s 20 of the Act. The payment to OCBC had regularised the outstanding mortgage account of the respondent. The respondent did not deny that RM247,000 was paid into her account by the appellant. That was good enough to constitute a payment made for the benefit of the respondent pursuant to a voidable contract. The respondent could not absolve liability by blaming Tharvinder because the respondent had given Tharvinder authority to access the respondent's account without limitation. There was also no privity of contract between the appellant and Tharvinder to enable any direct recourse against her by the appellant. The learned judge had erred in law in ruling that the appellant's recourse was to make claim against Tharvinder. The learned judge did not consider the clear provision of s 20 of the Act. The respondent could not be allowed to keep the monies or to benefit under an agreement which she had vitiated (see paras 22–27).

[Bahasa Malaysia summary

Responden dan perayu telah memasuki perjanjian jual beli ('SPA pertama') bagi hartanah yang dimiliki oleh responden pada harga yang dipersetujui sebanyak RM550,000. Berdasarkan SPA pertama tersebut, perayu telah membayar deposit sebanyak RM38,000 yang mana RM33,896.47 dari jumlah tersebut telah dibayar kepada OCBC Bank untuk memperkemas akaun gadai janji responden dan baki deposit cengkeram yang berjumlah RM4,103.53 dibayar secara tunai. Baki harga belian sebanyak RM247,000 telah dibayar kepada akaun Maybank responden. Masalah timbul apabila OCBC mendapati bahawa seorang yang bernama Tharvinder telah menyamar sebagai responden dan menandatangani SPA pertama. Pihak-pihak kemudian bersetuju untuk membatalkan SPA pertama dan memasuki SPA kedua dengan terma-terma yang sama seperti SPA pertama. Pada 22 Ogos 2012, responden memaklumkan kepada perayu bahawa dia tidak mahu meneruskan dengan SPA kedua. Responden mendakwa bahawa dia diancam, dipaksa dan ditipu oleh perayu dan juga oleh Tharvinder untuk menandatangani SPA kedua. Akibatnya, perayu memfailkan tindakan di Mahkamah Tinggi menuntut pelaksanaan spesifik SPA kedua dan secara alternatif, perayu menuntut pemulangan wang yang dibayar menurut SPA pertama dan dianggap dibuat di bawah SPA kedua. Mahkamah Tinggi menolak tuntutan dan tuntutan alternatif oleh perayu. Hakim yang bijaksana mendapati bahawa SPA kedua

tidak ditandatangani secara sukarela oleh responden. Hakim yang bijaksana juga menyimpulkan bahawa pihak yang tepat untuk membayar balik adalah Thavinder, maka tuntutan hak perayu harus ditujukan kepada Thavinder. Terkilan dengan keputusan tersebut, perayu memfailkan rayuan semasa.

Diputuskan, membenarkan sebahagian rayuan:

(1) Hakim yang bijaksana mendapati SPA kedua tidak ditandatangani secara sukarela oleh responden. Mahkamah bersetuju dengan keputusan hakim yang bijaksana kerana ia adalah suatu penemuan fakta berdasarkan testimoni saksi-saksi di hadapannya. Oleh kerana hakim bicara yang bijaksana mendapati SPA kedua telah dilaksanakan tanpa keizinan bebas dan oleh pengaruh yang tidak wajar, maka SPA kedua boleh dibatalkan berdasarkan pilihan responden, seperti yang dinyatakan di bawah s 19(1) Akta Kontrak 1950 ('Akta'). Responden telah menggunakan haknya dengan betul untuk membatalkan SPA kedua, oleh itu, tiada kontrak yang sah untuk menguatkuasakan apa-apa relief spesifik yang dimohon oleh perayu (lihat perenggan 14 & 16).

(2) Adalah jelas bahawa wang yang dibayar oleh perayu adalah untuk faedah responden seperti yang dinyatakan oleh s 20 Akta. Pembayaran kepada OCBC telah memperkemaskan akaun gadai janji responden yang tertunggak. Responden tidak menafikan bahawa RM247,000 telah dibayar ke dalam akaunnya oleh perayu. Itu adalah cukup untuk membentuk pembayaran yang dibuat bagi faedah responden menurut kontrak yang boleh dibatalkan. Responden tidak boleh membebaskan diri dari liabiliti dengan menyalahkan Tharvinder kerana responden telah memberikan kuasa kepada Tharvinder untuk mengakses akaun responden tanpa batasan. Selain itu juga, tidak terdapat priviti kontrak antara perayu dan Tharvinder untuk membolehkan apa-apa tuntutan langsung terhadapnya oleh perayu. Hakim yang bijaksana terkhilaf dalam undang-undang dalam memutuskan bahawa jalan keluar bagi perayu adalah dengan membuat tuntutan terhadap Tharvinder. Hakim yang bijaksana tidak mempertimbangkan peruntukan yang jelas dari s 20 Akta. Responden tidak boleh dibenarkan untuk menyimpan wang atau untuk mendapat faedah di bawah perjanjian yang dia telah batalkan (lihat perenggan 22–27).]

Notes

For cases on agreement in general, see 3(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 3449–3586.

Cases referred to

Choo Kok Beng v Choo Kok Hoe & Ors [1984] 2 MLJ 165b, PC (refd)

A *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35, SC (refd)
Lim Chor Ching & Ors v Idris Abdul Karim & another appeal [1998] MLJU 666; [1998] 3 CLJ Supp 145, HC (refd)
Teh Poh Wah v Seremban Securities Sdn Bhd [1996] 1 MLJ 701, CA (refd)
B *Yoong Sze Fatt v Pengkalan Securities Sdn Bhd* [2010] 1 MLJ 85, CA (refd)

Legislation referred to

Contracts Act 1950 ss 16(1), 19(1), 20

C **Appeal from**: Civil Suit No 2NCVC-1458–12 of 2012 (High Court, Kuala Lumpur)

Justin Voon (Lee Chooi Peng and Wong Jyh Ling with him) (Justin Voon Chooi & Wing) for the appellant.
D *K Kandiah (M Indrani with her) (Mohd Latip & Assoc) for the respondents.*

Rohana Yusuf JCA (delivering judgment of the court):

[1] The plaintiff's appeal before us is against the High Court decision which
E dismissed both the plaintiff's claim for specific performance of a sale and purchase agreement of a property, and the alternative claim for the return of the monies paid pursuant to the said agreement.

[2] We had allowed the appeal of the plaintiff in part. We affirmed the
F decision of the learned High Court judge on the dismissal of the prayer for specific relief. We however, allowed the alternative claim of the plaintiff for the refund of the monies made pursuant to the agreement. Consequently the defendant was ordered to repay the sum of RM285,000 to the plaintiff.

G **[3]** The factual background to this appeal were these. The defendant was at the material time a registered proprietor of a two storey terrace house property known as HSD 73153, PT 21991, Mukim Sungai Buloh, Daerah Petaling, Negeri Selangor, having a postal address at No 11, Jalan Margosa SD 10/5E,
H Bandar Sri Damansara 52200 Kuala Lumpur ('the property'). The property was charged to OCBC.

[4] Tharvinder Jeet Kaur a/p Jagjit Singh ('Tharvinder') was on and off
I living with the defendant at that property. In evidence it was disclosed that the defendant has a close, unusually intimate relationship with Tharvinder. The defendant knew Tharvinder through Datuk DJ Dave, who is Tharvinder's brother and a friend of the defendant.

[5] The plaintiff is a private limited company. Around July 2011, the plaintiff saw an advertisement of an auction by OCBC Bank ('OCBC') with regard to the property. The plaintiff was interested to purchase the property. An agreement for the sale and purchase of the property was prepared by the plaintiff's solicitors and executed on 1 September 2011 ('the first SPA') at an agreed price of RM550,000. Pursuant to the first SPA the plaintiff paid an earnest deposit of RM38,000, out of which RM33,896.47 was paid to OCBC to regularise the defendant's mortgage account and the balance of the earnest deposit in the sum of RM4,103.53 was paid in cash. The balance purchase price of RM247,000 was paid into the defendant's Maybank account.

[6] The first SPA was purportedly executed by the defendant but as it turned out later, it was in fact executed by Tharvinder, who impersonated and represented herself as the defendant to the plaintiff, as well as to the solicitors acting for the plaintiff preparing the first SPA, Encik Lim Kean Sheng ('PW3') from Messrs KS Lim and Ong.

[7] It was only in the process of inquiring for the redemption statement that OCBC detected the signature of the letter of authorisation by the defendant differed from that in its records. OCBC requested the parties to come for verification through the thumb print of the defendant. On 28 June 2012, all parties were present at OCBC including Tharvinder and the defendant. Also present were the solicitors who had prepared and witnessed the execution of the first SPA PW3, the plaintiff's representative Encik Yap Han Hem ('PW1') together with three Chinese men. It was then that the fraudulent scheme of Tharvinder was discovered. Tharvinder had admitted impersonating the defendant in executing the first SPA and had held herself out as the defendant throughout the deal.

[8] The defendant said after leaving OCBC that day, she was brought to the office of Messrs KS Lim and Ong, together with Tharvinder and PW1 and the three Chinese men. At Messrs KS Lim and Ong, the defendant executed the deed of rescission of the first SPA and also a new sale and purchase agreement ('the second SPA'). It was the plaintiff's case that even though it was fraudulently misled by Tharvinder, all parties had come to an agreement to rescind the first SPA and the defendant had agreed to enter into the second SPA on similar terms as the first SPA. The differences were only regarding the length of time and dates. The claim of the plaintiff is premised on the second SPA where all payments made pursuant to the first SPA were deemed to be performed under the second SPA.

[9] On 22 August 2012 the plaintiff however, received a letter from the defendant's solicitors informing that the defendant did not want to proceed to complete the second SPA, because she claimed she did not sign the second SPA

A voluntarily. According to the defendant she was threatened, forced and fraudulently misled by the plaintiff and also by Tharvinder into doing so.

[10] The defendant said she never intended to sell her only property and it was Tharvinder who had all along acted on her behalf without her knowledge or consent. When she executed the second SPA the defendant claimed that she was not in a clear state of mind and was being intimidated, threatened and forced by the plaintiff and Tharvinder to execute both the deed of rescission of the first SPA and the second SPA.

[11] The learned judge having heard the evidence of the witnesses before him, found the circumstances surrounding the execution of the second SPA very suspicious. It was the observation of the learned judge that the second SPA was executed by the defendant rather hurriedly right after the meeting at OCBC where parties adjourned to the office of Messrs KS Lim and Ong, the conveyancing solicitors who acted for the plaintiff. The learned judge accepted the evidence of the defendant who said she was in a state of confusion, not in a proper state of mind, and was overwhelmed by the presence of the plaintiff's representative Yap Han Kem ('PW1') and the other three Chinese men who took her to the lawyer's office. At the office, the deed of rescission to rescind the first SPA and the second SPA were all ready for her execution. The defendant testified that PW3 and Tharvinder had demanded her to execute both the documents in rough, loud and threatening voice that she was forced to sign them.

[12] After the execution of the second SPA, another meeting was held at Messrs KS Lim and Ong. This time the defendant sought the help of Datuk DJ Dave to resolve the matter. The meeting was held in the presence of the defendant, Tharvinder, Datuk DJ Dave, PW1 and PW3, where Tharvinder owned up that she was the one who orchestrated the first SPA. There was a recording of that meeting which was tendered in evidence where Tharvinder also admitted receiving and collecting the sum of RM247,000 on behalf of the defendant. Tharvinder agreed to pay back the amount to the plaintiff. Also in that recorded transcript the defendant told PW3 that she was not in her proper state of mind when she signed the deed of rescission and the second SPA.

[13] Having analysed all these evidence, the learned judge concluded that the second SPA can be vitiated as it was procured by undue influence within the meaning of s 16(1) of the Contracts Act 1950. The learned judge opined that the defendant being a single lady was confused and frightened by the presence of four or five men unknown to her, including Tharvinder directing her to execute the deed of rescission and the second SPA. In the words of the learned trial judge he found '... without a doubt that the defendant was placed in a position of helplessness, where any decision made at the behest of the plaintiff's

representative and Tharvinder would be vitiated by reason of undue influence. It is clear that parties were not dealing at arms length'. A

[14] We have properly scrutinised the finding of facts made by the learned judge in concluding that the second SPA was not signed voluntarily by the defendant. Having read the submissions and after hearing the oral submissions of both parties before us, we were in agreement with that finding as it was a finding of fact based on the oral testimonies of witnesses before him. We have no reason to disturb a finding made upon the evidence at trial, where the trial judge being a trier of facts has a better advantage than us. The finding was made on assessing the relevant testimonies and substantiated by good and sound reasons which we have no reason to differ from or interfere with. B C

[15] It is a long established principle that generally, an appellate court will not intervene with the findings of facts made by a trial judge. Only when a trial judge has so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial and in reaching his conclusion; has not properly analysed the entirety of the evidence and relevancy of contemporary documents which were given before him; has misapprehended the facts and blindly applied wrong principles of law, then it is the plain duty of an appellate court to intervene and correct the error, lest otherwise the error result in serious injustice (see *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 (SC), *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165b (PC), *Yoong Sze Fatt v Pengkalan Securities Sdn Bhd* [2010] 1 MLJ 85, *Lim Chor Ching & Ors v Idris Abdul Karim & another appeal* [1998] MLJU 666; [1998] 3 CLJ Supp 145). D E F

[16] The second SPA, since it was found by the learned trial judge to have been executed without free consent and by undue influence, is voidable at the option of the defendant, as provided under s 19(1) of the Contracts Act 1950. The defendant had correctly exercised her right to vitiate the second SPA, hence there was no valid contract to enforce any specific relief sought by the plaintiff. It was for this reason that we agreed with the learned judge that, no specific relief is available to the plaintiff. G H

[17] The learned judge had also dismissed the alternative prayer by the plaintiff for the refund of the monies paid pursuant to the first SPA and deemed made under the second SPA. The learned judge has ruled that the right party to refund would be Tharvinder. Hence the proper claim of the plaintiff had to be directed to Tharvinder. We however were not able to discern from the grounds of judgment of the learned trial judge as to his reason for holding so. I

[18] In its statement of claim the plaintiff sought for an alternative relief for the refund of the monies paid pursuant to the first SPA which was to be treated

as payment made under the second SPA. The plaintiff's alternative prayer was for the return of the sum of RM38,000 paid as earnest deposit, the balance purchase price of RM247,000, and the pre-agreed liquidated damages of RM55,000 pursuant to cl 11 of the second SPA.

[19] The payment of earnest deposit totalling RM38,000 was not in dispute. Out of this sum, RM33,896.47 was paid to OCBC to regularise the mortgage account of the defendant and the balance of RM4,103.53 was paid in cash to Tharvinder. There was also no dispute that a sum of RM247,000 was paid into the account of the defendant at Maybank. The cheque payable to the account of the defendant was passed to Tharvinder, who acknowledged receipt of the same. The defendant in fact admitted that RM247,000 was credited into her account but pleaded ignorance on what the payment was for. In her testimonies she said, Tharvinder had informed her that, it was some payment for the church and so she allowed Tharvinder to withdraw them from her account at Maybank. Tharvinder had confirmed what the defendant said and had also admitted that she had eventually withdrawn the monies from the defendant's account.

[20] This brought us to s 20 of the Contracts Act which deals with monies received under a voidable contract, caused by undue influence. It provides:

> 20 When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the court may seem just.

Illustration (b) to the above section further clarifies the legal position on monies received under such a contract:

> Illustration (b) A, a money lender advances RM100 to B, an agriculturist, and, by undue influence, induces B to execute a bond for RM200 with interest at 6 per cent per month. The court may set the bond aside, ordering B to repay the RM100 with such interest as may seem just.

[21] Section 20 states the legal position and the implication of avoiding a contract for reason of undue influence. It says, a party who is entitled to set aside a contract due to undue influence, may be ordered by the court to return the benefit obtained under such a contract, upon terms that the court deems fit. Illustration (b) to s 20 amplifies further the implication of s 20, that a person who receives benefit under such a contract may be ordered by the court to return it on terms.

[22] On the facts of the present case, it is without a doubt that the plaintiff

had paid an earnest deposit of RM38,000 for the benefit of the defendant when her mortgage account was regularised by that payment. The sum of RM247,000 was deposited into the bank account of the defendant. The defendant as an account holder, has sole legal control and custody of her own bank account. It is accepted that no person can have any access to another person's account unless consented to. In this case the defendant had allowed Tharvinder free access to her account and she should be held responsible for the outcome of her action. Since she had allowed Tharvinder to meddle with her account, in our view she cannot absolve her responsibility by just feigning ignorance about what went on in her account. We all know that under the normal order of the day, her bank would have contacted her about an unusually large transaction or an out of the ordinary transaction such as this. She would have been alerted and would have been aware of the transaction with the plaintiff. While saying that the monies was drawn out by Tharvinder, the defendant had not shown any shred of documentary proof to support her version. It was also in evidence that due to their close relationship, there was a history of events between them where the defendant had on many occasions advanced monies to Tharvinder. In a police report lodged by the defendant against Tharvinder, there were occasions where Tharvinder had taken her important documents, her valuable including jewellery. Thavinder had destroyed the defendant's documents and took her passport etc. In relation to this withdrawal of the sum of RM247,000 the defendant said Tharvinder took her identification card to withdraw the money at the Bank. Quite obviously, she had also allowed her identification card be kept and used by Tharvinder.

[23] We found it clear that the monies paid by the plaintiff was for the benefit of the defendant as envisaged by s 20 of the Contracts Act. The payment to OCBC had regularised the outstanding mortgage account of the defendant. The defendant did not deny that RM247,000 was paid into her account by the plaintiff. In our view that is good enough to constitute a payment made for the benefit of the defendant pursuant to a voidable contract. The testimonies of the defendant that she had allowed Tharvinder to take out that money from her account, cannot absolve her liability to return the money which was paid for her benefit under a contract which she had avoided for reason of undue influence.

[24] In relation to authorising the use of account, the decision of this court in *Teh Poh Wah v Seremban Securities Sdn Bhd* [1996] 1 MLJ 701 would provide a useful guidance. In that case, the wife who had given a blanket authority for her husband to transact shares in her trading account was held to be responsible for the loss in that account. Likewise, in the present case, since the defendant had given Tharvinder the authority to access her account without limitation, she cannot now say she was not the one benefitting from that payment and need not return that money to the plaintiff. The defendant

may have a right to claim back the monies from Tharvinder, either by bringing her as a third party to the suit by the plaintiff or to directly claim indemnity from her. In this regard, we took note that the defendant initially had brought Tharvinder as a third party in the proceedings. Tharvinder however had successfully set aside the third party order against her at the Court of Appeal. The setting aside of the third party order was made by the court with liberty to file afresh. No step however, was taken by the defendant to bring Tharvinder as a third party till the end of the trial.

[25] There was no privity of contract between the plaintiff with Tharvinder to enable any direct recourse against her by the plaintiff. The learned judge did not make clear on his reason when he said the plaintiff's recourse was against Tharvinder. We are not in agreement with the learned judge on this point.

[26] Premised on all the above reasons it is our considered view that the plaintiff is entitled to be refunded by the defendant because the monies paid pursuant to the agreement was in effect paid for the benefit of the defendant. The defendant cannot deny this. The defendant cannot absolve liability by blaming Tharvinder, because she had given blanket authority to Tharvinder and was quite happy to let Tharvinder take out the monies paid by the plaintiff without investigating properly the status of her account. Since the second SPA had been vitiated by her, the defendant cannot benefit from any payment under the second SPA. The earnest deposit of RM38,000 was obviously paid for the benefit of the defendant, out of which RM33,869.47 was paid to regularise the mortgage account of the defendant at OCBC. The other RM4,103.53 was paid to Tharvinder in cash pursuant to the first SPA.

[27] We therefore were not in agreement with the learned trial judge on this issue. In our view the learned judge had erred in law in ruling that the plaintiffs recourse is to make a claim against Tharvinder. The learned judge did not consider the clear provision of s 20 of the Contracts Act. The defendant should not be allowed to keep the monies or to benefit under an agreement which she had vitiated. For that reason, we allowed this part of the appeal and ordered the defendant to refund the plaintiff the earnest deposit of RM38,000 and RM247,000 totalling RM285,000 to be paid within 30 days from the date of this judgment. We did not allow the claim for the pre-agreed liquidated damages of RM55,000, since the contract was already avoided by the defendant.

We made no order as to costs.

Appeal allowed in part.

Reported by Dzulqarnain Ab Fatar